IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

NAVAJO NATION and CURTIS BITSUI,

Plaintiffs,

v.

No. 1:16-cv-888 WJ/LF

HONORABLE PEDRO G. RAEL, Judge,
New Mexico Thirteenth Judicial District, and
LEMUEL L. MARTINEZ, District Attorney,
New Mexico Thirteenth Judicial District,

Defendants.

PLAINTIFFS' REPLY ON MOTION FOR RECONSIDERATION

Plaintiffs NAVAJO NATION and CURTIS BITSUI, reply to *Defendant Martinez' Response to Plaintiffs' Motion for Reconsideration* (Doc. 37) and *Judge Rael's Response in Opposition to Plaintiffs' Motion for Reconsideration* ("Rael Response") (Doc. 38).

Plaintiffs Motion for Reconsideration (Doc 36) ("Motion") is premised on "the need to correct clear error or prevent manifest injustice . . . and is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); Motion at 2.

Subsequent to the filing of the Motion, the Tenth Circuit Court of Appeals opined that tribal ownership of an allotment in any amount renders the property "tribal land," over which state courts lack jurisdiction. *Public Service Company of New Mexico v. Barboan, et. al.*, Case No. 16-2050 (10th. Cir. May 26, 2017), attached as "Exhibit A;" *see also* 25 C.F.R. § 169.1(d) (2012) ("Tribal land means land or any interest therein, title to which is held by the United States in trust for a tribe…."). The facts concerning the status of the land in *Barboan* are remarkably similar to those presented here.

The Public Service Company of New Mexico ("PNM") filed an action in this Court to condemn a right-of-way across five parcels of land that were initially allotted to individual members of the Navajo Nation, including two parcels in which the Navajo Nation had subsequently acquired interests of .14% and 13.6% pursuant to the Department of the Interior's Land Buy-Back Program for Tribal Nations. *See* Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064, 3066-3067 (authorizing a $1.9 billion land buy-back program for tribal nations); *Barboan* at 9. And as is the case here, the allotments at issue in *Barboan* remained in trust status. *Id.* ("The 1934 Indian Reorganization Act ended the Allotment Era… and indefinitely extended the twenty-five-year trust period for allotted lands.") citing Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101-5144). This Court held that by virtue of the Nation's ownership, the parcels with an interest held by the Navajo Nation are "tribal land" not subject to condemnation under federal law. *Public Service Company of New Mexico v. Approximately 15.49 Acres of Land in McKinley County, New Mexico*, 115 F.Supp.3d 1151, 1169 (D. N.M.). The Court of Appeals affirmed, finding that Congress' intent in creating tribal buy-back programs was to "protect and strengthen tribal sovereignty" over Indian lands. *Barboan* at 23.

In this action, the unrefuted evidence demonstrates that the Navajo Nation holds an undivided interest[1] in the land in question and that, despite Judge Rael's holding to the contrary, the United States holds the land in trust. Doc. 21-1. The land is tribal land. There is no basis for a state court to consider "documentary evidence, testimony, and several rounds of briefing" as suggested in the Rael Response. Doc. 38 at 8. The sovereign interests of the Navajo Nation, the same interests protected by the courts of this Circuit in *Barboan*, cannot be infringed by

[1] The title Status Report of September 6, 2016 confirms that the Nation's aggregate interest, held in trust, is more than 34%. Doc. 21-1 at 3.

permitting a state court to construe the evidence in a manner to create jurisdiction where none exists.

It is axiomatic that for collateral estoppel to apply, the decision must be made by a court of competent jurisdiction. *See: Montana v. United States*, 440 U.S. 147, 153 (1979). In Indian Country, where federal interests are paramount, a federal court is not required to give collateral estoppel protection to a state court's determination of its jurisdiction, particularly where the Tenth Circuit has already opined that lands where an Indian tribe holds an undivided interest are per se "tribal lands." The Court's reliance on *Park Lake Resources* and *Burrell* for the proposition that collateral estoppel applies to jurisdictional determinations is misplaced. In those cases collateral estoppel was applied to the dismissal of the case on jurisdiction grounds, and the federal courts refused to revisit the grounds for the dismissal. In the instant case, the Court is being asked to review whether the state court was a court of competent jurisdiction, not whether the state court had authority to dismiss a case for lack of jurisdiction. If the state court was not a court of competent jurisdiction, nothing that court did is entitled to collateral estoppel protection.

Despite the inapplicability of *Burrell* to the instant case, the Tenth Circuit's decision there offers strong policy considerations supporting a federal court's authority to determine whether the state court was a court of competent jurisdiction. When federal courts review decisions of tribal courts concerning matters arising in Indian Country they routinely, and often *sua sponte*, review the bases for the tribal court's jurisdiction because "[a]s a general matter, th[e] Court disfavors enforcing judgments of tribal courts that act without jurisdiction." *Burrell v. Armijo*, 456 F.3d 1159, 1175 (10th Cir. 2006) (McConnell, J. concurring) (*citing MacArthur v. San Juan County*, 309 F.3d 1216, 1225 (10th Cir.2002)). This ensures that defendants who are brought into tribal courts in Indian Country are "protected against an unlawful exercise of Tribal

Court judicial power." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). Such inquiries are a matter of routine federal jurisprudence. *Burrell* at 1176 ("Whether such an inquiry is mandatory or discretionary, however, *sua sponte* consideration appears to be the accepted practice.")

Federal courts should be equally vigilant to ensure that when tribal defendants are brought into state court, particularly where it is alleged that the action arises in Indian County, and paraphrasing *Nat'l Farmers Union*, the tribal member is "protected against an unlawful exercise of [State] Court judicial power." Federal courts have expressed with some frequency concerns over the ability of tribes and their members to secure fair treatment in state courts. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 313 n. 11, (Souter, J., dissenting) (noting the inadequacy of state fora to vindicate federal rights, including rights of Indian tribes).

Accordingly, determination of whether the state court was competent to decide the trespass action here is a necessary part of the Court's collateral estoppel analysis. Federal law preempts state court jurisdiction over tribal lands or Indian country; the state court lacked jurisdiction to hear a trespass action arising on tribal land; and the state court judgment is not entitled to preclusive effect.

"Justice requires not only recognizing the judgments of courts of competent jurisdiction but also refusing to recognize a judgment that manifestly lacks legal validity." *Burrell* at 1176. In order to prevent "manifest injustice," Plaintiffs move for reconsideration and submit that collateral estoppel does not prevent this Court from determining that the state court was without jurisdiction to adjudicate a trespass action concerning the Allotment.

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Respectfully submitted this 5th day of July, 2017.

NAVAJO NATION DEPARTMENT OF JUSTICE

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CERTIFICATE OF SERVICE

I certify that on July 5, 2017, I served the foregoing on counsel of record for all parties via the CM/ECF system.

/s/ *Stanley M. Pollack*
Stanley M. Pollack